81-2060

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CASE NO.

in the Supreme Court of the United States

October Term, 1981

LAND & LEISURE, INC., et al.,
Petitioners,

vs.

ROGER L. SUMMER, et al.,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

April 29, 1982

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QUESTIONS PRESENTED FOR REVIEW

I

DOES THE TRIAL COURT HAVE DISCRETION TO DETERMINE AS A MATTER OF LAW WHEN THE STATUTE OF LIMITATIONS BEGINS TO RUN IN A FEDERAL SECURITIES FRAUD CLAIM?

II

WHERE SEVEN YEARS PRIOR TO THE COMPLAINT FOR ALLEGED SECURITIES FRAUD, THE CORPORATE DEFENDANT STOPPED FILING ANNUAL PUBLIC REPORTS AND DISTRIBUTING STOCKHOLDER REPORTS, AND THE VALUE OF ITS STOCK DROPPED BY EIGHTY PERCENT, CAN THE PLAINTIFF'S CONCLUSORY ALLEGATIONS OF DUE DILIGENCE PRECLUDE A DISMISSAL BASED ON THE STATUTE OF LIMITATIONS?

PARTIES

This petition is filed by the following defendants/appellees:

Land & Leisure, Inc., a Florida corporation[1]
Guy B. Bailey
Areca S. Bailey
Guy B. Bailey, Jr.
Charlotte Babcock

The following were also parties in the Court of Appeals:

Plaintiff/appellant:

Roger L. Summer

Defendants/appellees:

Arthur Young & Co.
Raymond James Associates, Inc.
Jerome Grossman
Robert Fischer
Robert Little (deceased)

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[1]The following Florida corporations are affiliates of Land & Leisure:

United Resources, Inc.
Country Club of Miami Corporation
G.B.B. Investments, Inc.
R.S. Investment Corporation

Arthur Young & Co. and Raymond James Associates, Inc., have filed or are filing with this Court separate petitions.

(Footnote 1 Continued)

KGS Marine, Inc.
Phillips International
Marine Motor Sales, Inc.
Phillips Hardware Sales, Inc.
Atgar Development Corporation
Section 3 Property Corp.
U.R.I. Strawberry Hills Corporation
U.R.I. Harbor Point #1 Corporation
U.R.I. Harbor Point #2 Corporation
U.R.I. Hotel Corporation
Sunshine Utilities Company, Inc.
Area Utilities Maintenance Corporation
Section 2 Property Corp.
Section 11 Property Corp.
Section Two Venture Corporation
Patio Villas Development Corp.
Country Club of Miami Realty, Inc.
Country Club Center
URI Centers, Inc.
URI Centers of Nevada, Inc. (a Nevada corporation)
C & D Enterprises, Inc. (a Nevada corporation)

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OPINIONS BELOW

The opinion of the court of appeals is reported: *Summer v. Land & Leisure, Inc.*, 664 F.2d 965 (5th Cir. 1981). The opinion of the United States District Court, Southern District of Florida, is unreported (but is included in the Appendix).

JURISDICTION

The United States Court of Appeals for the Fifth Circuit (Unit B) entered its order affirming in part, reversing in part, and remanding, on December 28, 1981, and denied rehearing on January 29, 1982. Jurisdiction is invoked under 28 U.S.C. §1254(1).

STATUTES INVOLVED

Florida Statutes §517.21 (1977) (Florida's "Blue Sky" act) (repealed by Laws 1978, c. 78-435, §5, eff. November 1, 1978):

> . . . provided, that no action shall be brought for the recovery of the purchase price after two years from the date of such sale. . . .

Florida Statutes §95.11(5)(d) (1973) (replaced 1975, *see infra*):

> Actions other than those for the recovery of real property can only be commenced as follows:
>
> * * *
>
> (5) within three years.—
>
> * * *
>
> (d) an action for relief on the ground of fraud, the cause of action in such case not to be deemed to have accrued until the discovery by the aggrieved party of the facts constituting the fraud.

Florida Statutes §95.11(3)(j) (1981) (Laws 1974, c. 74-382, §7, eff. January 1, 1975):

Actions other than for recovery of real property shall be commenced as follows: . . .

* * *

(3) within four years.—

* * *

(j) a legal or equitable action founded on fraud.

STATEMENT OF THE CASE

PROCEEDINGS BELOW

In 1978, Roger L. Summer ("Summer") sued Land & Leisure, Inc. ("Land & Leisure"), Guy Bailey, Areca S. Bailey, Guy Bailey, Jr., Charlotte Babcock (collectively, "the Baileys"), Arthur Young and Co., Raymond James Associates, Inc., Jerome Grossman, Robert Fischer, and Robert Little, claiming $54,000 in actual damages and $540,000 in punitive damages arising out of his purchase in 1971 through 1973 of stock in Land & Leisure. Summer's nine-count complaint sought damages under the federal securities statutes, 15 U.S.C. §§78j(b), 77k, 77l(2), and 77q, the Florida "Blue Sky" statute, Fla. Stat. Ch. 517, and Florida common law. As noted by the court of appeals:

> [M]ore than seven years elapsed between the first purchase of stock and the filing of the complaint, and more than five years passed from the last purchase of stock and the filing of the complaint.

664 F.2d at 965.

On motions by the various defendants under Rule 12(b), Fed.R.Civ.P., the district court held Summer's claims barred on the face of his complaint, and therefore dismissed his action with prejudice.

On appeal, the United States Court of Appeals for the Fifth Circuit (a) affirmed the dismissal of Summer's claims under Sections 11 and 12(2) of the Securities Act of 1933, 15 U.S.C. §77k and 77l(2); (b) reversed the

dismissal of Summer's Rule 10b-5 claims with respect to all defendants except Arthur Young and Raymond; and (c) affirmed the dismissal with respect to Arthur Young and Raymond, but directed that Summer be granted leave to amend on remand.

STATEMENT OF THE FACTS

Summer alleges that, between June 24, 1971, and January 3, 1973, he purchased $54,000 worth of Land & Leisure stock in reliance on a Land & Leisure prospectus dated June 17, 1971. The district court ruled that Summer's own complaint, filed in 1978, showed conclusively that by 1971 or 1972, Summer knew sufficient facts which in the exercise of due diligence would have led to the discovery of his cause of action:

> Plaintiff, in his Complaint, alleged that defendants failed to send annual reports or call annual shareholders meetings, as well as failing to supply plaintiff with financial information requested . . . . Plaintiff knew in 1971 and 1972 of the defendants [sic] failure to send reports or have the shareholders meetings, and was aware of the sharp decline in the value of the stock . . . . Inasmuch as it appears from the face of the Complaint that plaintiff was aware of facts which would have disclosed the alleged fraud and therefore due diligence is absent, the Court finds that plaintiff's §10(b) and 10b-5 claims are barred.

The Fifth Circuit, however, ruled that other allegations in the complaint could show due diligence or concealment sufficient to toll the statute of limitations:

> The allegations throughout the complaint which would establish appellant's due diligence or concealment of facts by the corporate defendants fall into three categories: (1) that the defendants conspired to fail to file required reports with the Securities and Exchange Commission, to fail to file and mail stockholders reports and proxy statements, and to fail to call annual stockholders meetings; (2) that defendants attempted to lull appellant by telling him that reports on L&L's financial condition would be forthcoming and that all was well with L&L; and (3) that defendants conspired to prevent the appellant from learning the true condition of the corporation by denying appellant access to corporate books and records, by falsely advising appellant that records had been lost or were unavailable, and by making false entries in the books and records. Appellant asserts, as a consequence of these actions, he did not reasonably discover the existence of the claims until 1977.

664 F.2d at 968-969.

The complaint alleges (¶30) that Land & Leisure failed to hold a shareholders' meeting at any time after 1971. The complaint further alleges (¶41) that at directors' meetings in October and December, 1971, and February, 1972, the directors discussed inaccuracies in the 1971 prospectus, which they failed to disclose; that after

United Resources, Inc., bought a controlling interest in Land & Leisure in February, 1972, the new directors (the Baileys) failed to disclose inaccuracies in the 1971 prospectus. The complaint then alleges (¶41(l)) that the Baileys and Robert Fischer

> took affirmative action to prevent your Plaintiff from learning anything at all about the true condition of the Defendant LAND & LEISURE through the means and instrumentalities of interstate commerce, including the mails and telephonic communication, whereby they represented to your Plaintiff on numerous occasions that reports on the financial condition would be forthcoming, that all was well with the defendant LAND & LEISURE, and that annual meetings of shareholders as well as SEC reports would be forthcoming, when in truth and fact, they, and each of them, knew or should have known in the exercise of ordinary care that such was not the case.

The complaint continues (¶41(m)) that Summer did not learn the true facts until he filed a state court action in October, 1977, to obtain access to the corporate books and records, and that after obtaining access, Robert Fischer,

> aided and abetted by others whose names are presently unknown to your Plaintiff, attempted to prevent your Plaintiff from learning the true condition of the Defendant LAND & LEISURE by hiding records from your Plaintiff, by removing records supplied to the Plaintiff and hiding same, by deliberately and/or

negligently causing false entries to be made in the books and records of the Defendant LAND & LEISURE and by deliberately advising your Plaintiff that certain books and records were lost or destroyed when in truth and fact the same were in the possession, custody and control of the Defendant LAND & LEISURE, or its officers, employees or agents.

REASONS FOR GRANTING THE WRIT

I

DOES THE TRIAL COURT HAVE DISCRETION TO DETERMINE AS A MATTER OF LAW WHEN THE STATUTE OF LIMITATIONS BEGINS TO RUN IN A FEDERAL SECURITIES FRAUD CLAIM?

Summer knew in 1971 the very facts he now claims as "concealment": that Land & Leisure stopped holding annual stockholders' meetings, stopped filing or mailing any reports to stockholders, and suffered a precipitous decline in stock value. Yet, Summer did nothing until October, 1977, when he did what he could have done in 1971—sued Land & Leisure to obtain access to its books and records.

The Fifth Circuit, however, held that Summer's conclusory allegations of due diligence aimed to toll the statute of limitations presented a jury question (although expressing "no opinion as to whether the record in the instant case on remand will develop such that the due diligence issue can be resolved on summary judgment, or whether a full trial will be necessary," 664 F.2d at 970), and, relying on *Conley v. Gibson*, 355 U.S. 41, 45-46 (1967), reversed the dismissal of Summer's claim.

The Fifth Circuit's decision subverts the liberal pleading requirements under the federal rules to defeat the very purpose of the statute of limitations: to avoid vexatious prosecution of stale litigation.

As this Court stated, albeit in another context (medical malpractice), in *United States v. Kubrick*, 444 U.S. 111, 122, and 124 (1979):

> Statutes of limitation, which "are found and approved in all systems of enlightened jurisprudence," represent a pervasive legislative judgment that it is unjust to fail to put the adversary on notice to defend within a specified period of time and that "the right to be free from stale claims in time comes to prevail over the right to prosecute them." These enactments are statutes of repose; and although affording plaintiffs what the legislature deems a reasonable time to present their claims, they protect defendants and the courts from having to deal with cases in which the search for truth may be seriously impaired by the loss of evidence, whether by death or disappearance of witnesses, fading memories, disappearance of documents, or otherwise.
>
> * * *
>
> If he fails to bring suit because he is incompetently or mistakenly told that he does not have a case, we discern no sound reason for visiting the consequences of such error on the defendant by delaying the accrual of the claim until the plaintiff is otherwise informed or himself determines to bring suit.
>
> * * *

> [I]f in this complicated malpractice case, the statute is not to run until the plaintiff is led to suspect negligence, it would be difficult indeed not to apply the same accrual rule to medical and health claims arising under other statutes and to a whole range of other negligence cases arising under the Act and other federal statutes, where the legal implications or complicated facts make it unreasonable to expect the injured plaintiff, who does not seek legal or other appropriate advice, to realize that his legal rights may have been invaded.
>
> [citations omitted]

The courts of appeals have often expressed the view (or assumed) that the running of the statute of limitations on a Rule 10b-5 claim is a question for the jury (although many of those same courts have affirmed defense summary judgments or dismissals on the question).[2]

In *State of Ohio v. Peterson, Lowry, Rall, Barber & Ross*, 651 F.2d 687 (10th Cir. 1981), *cert. denied*, 102 S.Ct. 392 (1981), however, the Tenth Circuit reviewed the origins and development of the federal equitable

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[2]*See, e.g.*, Herm v. Staford, 663 F.2d 669, 682-683 (6th Cir. 1981); Robertson v. Seidman & Seidman, 609 F.2d 583, 591 (2nd Cir. 1979); Jones v. Ford Motor Co., 599 F.2d 394 (10th Cir. 1979); Gaudin v. KDI Corp., 576 F.2d 708, 712 (6th Cir. 1978); Goldstandt v. Bear Stearns & Co., 522 F.2d 1265 (7th Cir. 1975); Berry Petroleum Co. v. Adams & Peck, 518 F.2d 402 (2nd Cir. 1975); Hupp v. Gray, 500 F.2d 993 (7th Cir. 1974); Klein v. Shields & Co., 470 F.2d 1344 (2nd Cir. 1972); Klein v. Bower, 421 F.2d 338 (2nd Cir 1970).

tolling doctrine and concluded that where the facts are sufficiently persuasive, the district judges have the discretion to decide the issue "in the manner of chancery":

> In view of the equitable origin of the tolling doctrine, we think there remains some room for discretion by the court on the issue of plaintiff's discovery and diligence in cases under §10(b) when the pleadings show that the action would be time-barred but for the equitable doctrine. . . .
>
> Limitations rules have traditionally been cast in terms of a prohibition on the *commencement* of an action. In addition to the general policy favoring repose and the quieting of titles, the statute seeks to relieve defendants of the cost and vexation of protracted litigation and the uncertainty of contingent liabilities. Not only defendants but also the courts have an interest in the timely commencement of actions. The adjudication process is hampered by stale evidence and absent witnesses; the burden on court calendars will instantly increase if actions now time-barred were revived by a new statute or tolling rule.
>
> *Any rule which makes the statute of limitations necessarily a jury question defeats the statute's purpose of preventing trials of stale claims.* The need to avoid vexatious litigation is especially acute in cases under §10(b) involving public misrepresentations in the sale of publicly traded securities, an area of the law which readily engenders multiple

> lawsuits arising out of the same underlying transactions. Contingent liabilities due to unfiled claims create special problems when they involve corporations with publicly traded securities. These problems are compounded by a tolling rule which effectively neutralizes the statute of limitations.
>
> Where, as here, a §10(b) action alleges substantially the same facts as in prior litigation, summary disposition is appropriate if the documents before the court clearly and convincingly persuade the trial judge that plaintiff in the exercise of reasonable diligence would have discovered the fraud at such a time as to bar the action.

651 F.2d at 693-694 (additional emphasis added).[3]

In the case below, the Fifth Circuit held that the question was one for the jury, which the district court could not decide on a motion to dismiss. Petitioners submit that to permit a plaintiff to disguise his manifest lack of due diligence behind conclusory allegations of concealment defeats the very purpose of the statute of

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[3]The court further held that an unsuccessful act of concealment does not toll the statute of limitations:

> [W]e see *no reason why an act of concealment by defendant should excuse plaintiff from his obligation of diligence, which he owes the court as well as his adversaries.*
>
> [emphasis added]

Id.

limitations: to avoid stale litigation. This Court should therefore accept jurisdiction and hold, as the Tenth Circuit has held, that the district courts have discretion to hold Rule 10b-5 claims time barred where the facts are sufficiently persuasive.

II

WHERE SEVEN YEARS PRIOR TO THE COMPLAINT FOR ALLEGED SECURITIES FRAUD, THE CORPORATE DEFENDANT STOPPED FILING ANNUAL PUBLIC REPORTS AND DISTRIBUTING STOCKHOLDER REPORTS, AND THE VALUE OF ITS STOCK DROPPED BY EIGHTY PERCENT, CAN THE PLAINTIFF'S CONCLUSORY ALLEGATIONS OF DUE DILIGENCE PRECLUDE A DISMISSAL BASED ON THE STATUTE OF LIMITATIONS?

Even if the statute of limitations in securities fraud claims is to remain within the exclusive province of the jury, the decision below impermissibly permits a plaintiff to abuse liberal pleading requirements and create a paper issue where there is none.

Summer says he was defrauded in 1971 through 1973 by a 1971 prospectus. Summer also alleges, however, that beginning in 1971, Land & Leisure failed to file quarterly and annual reports with the SEC (itself a violation, according to Summer), failed to provide Summer with annual reports, failed to hold annual shareholders' meetings, and refused Summer's requests for financial

information. And, it was public knowledge that the bottom had fallen out of Land & Leisure stock in 1972.

In spite of these facts, Summer did nothing until 1977; and in 1977, prompted only by what he had known since 1971, he did only what he could have done in 1971: he sued in state court to obtain access to the books and records. His own tardy diligence (in 1977) caused him to file this suit, but whatever made him believe in 1977 that he might have a cause of action, he knew in 1971.

The Fifth Circuit held that these facts were insufficient to dismiss Summer's claim under Rule 12(b)(6). If permitted to stand, this precedent would permit any plaintiff with an expired claim but a clever lawyer to harass his putative defendants through years of litigation, delaying the inevitable adjudication that the statute of limitations has run.

This precedent should not be permitted to stand. Summer's knowledge in 1971 was as a matter of law, at the very least, sufficient to put him on "inquiry notice." Had he then exercised due diligence, he would have discovered whatever he claims to have discovered in 1977 when he finally did exercise due diligence. *See State of Ohio v. Peterson, et al.*, 651 F.2d at 694; *Townsend v. Columbia Operations*, 667 F.2d 844, 850 (9th Cir. 1982) (statute of limitations begins to run when plaintiff has "inquiry notice"); *Buder v. Merrill, Lynch, Pierce, Fenner and Smith*, 644 F.2d 690, 693 (Fla. 8th Cir. 1981) ("the totality of the information received" held sufficient to "excite inquiry" in plaintiff; the statutory period " 'need not await his 'leisurely discovery of the full details' regarding his claim' "); *Jablon v. Dean Witter and Co.*,

614 F.2d 677, 682 (9th Cir. 1980) (defense summary judgment affirmed on statute of limitations where "a reasonably prudent person" would have realized defendant's predictions of stock value increase were incorrect); *Cook v. Avien, Inc.*, 573 F.2d 685, 697 (1st Cir. 1978) (data held "sufficient storm warnings to alert a reasonable person to the possibility that there were either misleading statements or significant omissions . . ."); *Goldstandt v. Bear, Stearns & Co.*, 522 F.2d 1265, 1269 (7th Cir. 1975) (due diligence required plaintiff to obtain independent legal advice); *Hupp v. Gray*, 500 F.2d 993, 996 (7th Cir. 1974) (dismissal affirmed, where deposition in related suit gave plaintiff opportunity to discover true facts; "at the very least, the circumstances should have aroused suspicion or curiosity on the part of plaintiff . . ."); *Klein v. Shields & Co.*, 470 F.2d 1344, 1347 (2nd Cir. 1972) (dismissal affirmed, where "at least the possibility of fraud should have been apparent to appellant; and the opportunity to inquire further . . . of course was available").

The Fifth Circuit has simply delayed the inevitable conclusion that Summer's action is barred by the statute of limitations. Summer will not be able to overcome his own allegations.

CONCLUSION

For these reasons, this Court should grant the petition for writ of certiorari.

DATED: April 29, 1982
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Respectfully submitted,

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